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No. 84-1513

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1984

PEOPLE OF THE STATE OF CALIFORNIA,

Office-Supreme Court, U.S.
FILED
MAY 10 1985
ALEXANDER L STEVENS,
CLERK

Petitioner,

v.

DANTE CARLO CIRAOLO,

Respondent.

On Writ of Certiorari To The
California Court of Appeal
First Appellate District

BRIEF OF AMICUS CURIAE ON
BEHALF OF THE PETITIONER

Appellate Committee of the
California District
Attorneys Association

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BRIEF OF AMICUS CURIAE

Amicus Curiae, Appellate

Committee of the California District
Attorneys Association and John H.
Darlington, District Attorney of Nevada
County, are filing this brief accompanied
by written consent of all parties to the
case pursuant to Supreme Court Rule 36(1).^{1/}

1. Letters of consent are enclosed
with this brief.

INTEREST OF AMICUS CURIAE

The Appellate Committee of
the California District Attorneys
Association is a committee created by
the District Attorneys of California
to utilize and coordinate the
resources of District Attorneys'
offices throughout the state, for the
purpose of presenting their views on
behalf of the People of the State of
California in cases which may have
major statewide impact upon the
prosecution of criminal offenses.

The successful detection,
apprehension and prosecution of marijuana
cultivators is a significant task of the
offices whose members comprise the
California District Attorneys Association.
Commercial marijuana cultivation is a
significant law enforcement problem in

many states in this Country, including California.^{2/} According to the "Final Report, 1984, Domestic Cannabis Eradication/Suppression Program", published in December of 1984 by the U.S. Department of Justice, Drug Enforcement Administration, Cannabis Investigations Section (at pp. 7-8), 3,802,927, cultivated marijuana plants were reported by law enforcement agencies in the 50 states as having been eradicated in 1984. An additional 9,178,283 wild marijuana plants were also reported eradicated.

Accordingly, the Committee

has decided to move for leave of this Court to file an Amicus Curiae brief herein. The Office of the District Attorney of the County of Nevada

2. See McClung, "Lawlessness Worst in Denny Area" (Sacramento Bee, July 22, 1982)

has been requested to prepare and submit this brief.^{3/} The District Attorney of the County of Nevada is an authorized law officer of the County, which is a political subdivision of the State of California (see Supreme Court Rule 36(4)).

This case gives this Court an opportunity to address an issue which it specifically deferred to a later time in Oliver v. United States (1984) 466 U.S. ___, 80 L.Ed. 2d 214, 225, fn. 11 [the scope of the curtilage exception to the open fields doctrine].

SUMMARY OF ARGUMENT

This brief urges this Court to grant certiorari to stem the growing tide of confusing and conflicting lower court decisions grappling with the Fourth Amendment's application to aerial

3. Assisted by the District Attorney of Los Angeles County.

overflights by police officers seeking to eradicate marijuana cultivation. We shall argue that a case-by-case analysis of these problems does not further the best interests of society, defendants or officers.

We shall ask this Court to hold that ordinary (naked-eye) aerial observation of marijuana from 1000 feet is not a search absent a reasonable effort to shield the crop from that type of aerial view, and that the location of the crop or the inadvertence of its discovery is irrelevant to the test we propose.

We will also argue that even if it is assumed for the sake of argument that the officer's view of Respondent's marijuana garden was a search, that "search" was not unreasonable within the meaning of the Fourth Amendment.

Finally, we will argue that exclusion of the evidence obtained with a search warrant is an improper sanction, assuming an unlawful search preceeded it, because the state of the law at the time and the issuance of a facially valid warrant would lead a reasonable officer to maintain a good-faith belief that his conduct was proper.

ARGUMENT

I

THE CONSTITUTIONAL PARAMETERS OF OVERFLIGHT OBSERVATION OF THE CURTILAGE OF A DWELLING NEED TO BE SPEEDILY RESOLVED BY THIS COURT TO STEM THE RISING TIDE OF CONFLICTING LOWER COURT OPINIONS WHICH ARE IN TURN CAUSING CONFUSION EACH SUMMER AMONG OFFICERS ASSIGNED TO THE NATIONWIDE EFFORT TO ERADICATE MARIJUANA

In Oliver v. United States, supra, 80 L.Ed. 2d at 226, this Court made a very critical policy statement regarding the Fourth Amendment and

"open fields":

"Nor would a case-by-case approach provide a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment."

At present, the lower courts are making a shambles of Fourth Amendment analysis concerning aerial overflights, because they insist on using the case-by-case approach condemned in Oliver. [ie., "Thus, rather than embracing a general rule courts have taken a case-by-case approach to the fourth amendment problems implicated by aerial surveillance." United States v. Bassford (D.Maine 1985) 601 F.Supp. 1324, 1330.] We urge this Court to unscramble the growing confusion in overflight cases by adopting the kind of clear guidelines espoused in Oliver. Compare

e.g., People v. Ciraolo (1984) 161 Cal. App. 3d 1081, 1089-1090 (the subject of this brief); United States v. Bassford, supra at 1330-1332.

II

ONE WHO MAKES NO REASONABLE ATTEMPT TO CONCEAL HIS MARIJUANA CROP FROM ORDINARY AERIAL OBSERVATION DOES NOT EXHIBIT AN EXPECTATION OF PRIVACY FROM ORDINARY AERIAL OBSERVATION BY POLICE WHICH SOCIETY IS PREPARED⁴ TO RECOGNIZE AS REASONABLE

The great fear which primarily led to the enactment of the Fourth Amendment was the fear of governmental abuse of the privacy and sanctity of the individual. 1 La Fave, Search and Seizure, A Treatise On The Fourth Amendment, §1.1(a). Everyone recognizes the potential for governmental abuse

4. Such invasion of privacy is abstract and theoretical at best. See Air Pollution Variance Board v. Western Alfalfa (1974) 416 U.S. 861, 865. 70 L.Ed. 2d 607.

of individual liberties resulting from our rapidly expanding technology. And, like chicken-licken, some individuals decry that the sky will fall on us and we'll have to live under "opaque bubbles" if police officers are allowed to look at the grounds around our homes, even from altitudes frequented by our airborne neighbors. People v. Ciraolo, supra at 1090. See United States v. Allen (9th Cir. 1980) 675 F.2d 1373, 1380; "Warrantless Aerial Surveillance: A Constitutional Analysis" 35 Van. L.R. 409, 431-433 (1982).

Amicus submits that this fear has led to and will continue to lead to an ad hoc extrapolation of confusing Fourth Amendment principles in overflight cases. Clearer guidelines must be drawn, because, just like the earth-bound officer, the airborne officer should not have to ". . . guess before

every [flight] whether landowners had erected fences sufficiently high, posted a sufficient number of warning signs, or located contraband in an area sufficiently secluded [but patently observable from reasonable altitudes] to establish a right of privacy." Oliver v. United States, supra, 80 L.Ed 2d at 226.

The test we propose is simple to state and, we believe, to apply: One who makes no reasonable effort to conceal his marijuana ^{5/} from ordinary aerial observation does not exhibit an expectation of privacy from ordinary aerial observation by police officers which society is prepared to recognize as reasonable. See -----

5. Or farm machinery [State v. Lashmelt, 71 Ill. App. 3d 429, 389 N.E. 2d 88 (1979)], or auto parts [People v. Superior Court (Stroud) (1974) 37 Cal. App. 3d 836]; etc.

United States v. Bassford, supra, 601 F. Supp. at 1330-1331; People v. Joubert (1981) 118 Cal. App. 3d 637, 640-648.

Thus, the height of a fence, a wall or a row of trees, the number of "no trespassing" signs, the distance of the house from a public road or any road, the existence of prior information, the demographics of the area, and the distance of the marijuana garden from the house are all irrelevant. The curtilage thus does not become a sanctuary for criminal enterprise judicially made invisible from ordinary aerial observation. As the court noted in Bassford, supra, at 1331-1332: "Thus, the inquiry is appropriately limited to whether there existed a reasonable expectation of privacy from aerial surveillance of an area, whether curtilage or noncurtilage (citation). [¶] Although Bassford may

well have hoped that planes passing overhead would be occupied by persons uninterested in his unusual farming location and his distinctive crop he could not reasonably expect that others, such as the police, would not fly over and take note. All of the plots . . . , including 'Plot #1', which was about ten feet from the house, were clearly and contemporaneously visible from the same aerial vantage point." (Emphasis added) The court also upheld an aerial observation, based on a subsequent informant's tip, of a single marijuana plot five feet from a nearby dwelling. Id. at 1334.

Amicus submits that the glaring disparity between the Fourth Amendment analysis in this case by the California Court of Appeal and by the court in Bassford is indicative of the conflict that currently needs resolution by this

Court. Further, our proposed analysis does not sanction clandestine surveillance [e.g. Katz v. United States (1967) 389 U.S. 347, 19 L.Ed. 2d 576]. It does not sanction telescopic surveillance of areas not visible to the naked eye [e.g., United States v. Kim (D. Hawaii 1976) 415 F. Supp. 1252]. It does not sanction protracted, intensive intrusions into areas or in ways not ordinarily utilized by ordinary people in their ordinary activities [See e.g., United States v. Knotts (1983) 460 U.S. 276, 283-284, 75 L.Ed.2d 55].

If a person does not want anyone to even casually observe any of his backyard activities, he may have to live under an opaque bubble. But as anyone who has flown in an aircraft knows, the intimate details of individual, earth-bound behavior cannot be readily

detected by casual observation from a moving aircraft at 1000 feet. It is the distinctive color of marijuana plants that catches the officer's gaze, not the domestic accoutrements (ie., pools, spas, cabanas, skylights, etc.) of the landowner.

Therefore, amicus submits that society is not prepared to recognize as opaque to the naked eye of an airborne policeman that which is readily observable to the naked but untrained eye of the ordinary airborne citizen. See Kay, Aerial Surveillance: Public Versus Private Expectations, 56 Cal. State Bar Jn. 258 (1981)

III

ASSUMING THAT THE AERIAL OVERFLIGHT DURING WHICH MARIJUANA WAS OBSERVED WITH THE NAKED EYE WAS A SEARCH, IT WAS NOT UNREASONABLE

Assuming for the sake of argument only that the aerial observation of Respondent's backyard was a search, amicus asks this Court to determine that the "search" was reasonable under the Fourth Amendment, contrary to the lower court's determination. (161 Cal. App. 3d at 1090) We realize this request involves the possibility of creating a new exception to the warrant requirement.

To begin with, it cannot be doubted that in this case, as in most overflight cases, the officers did not have probable cause to obtain a warrant before the overflight. That fact is admitted by the Court of Appeal in its opinion. (161 Cal. App. 3d at 1087, fn. 3) However, this Court has authorized limited intrusions, including searches, without a warrant where the societal interest in effective law enforcement was great when

balanced against the nonintrusive nature of the "search". See e.g., Terry v. Ohio (1968) 392 U.S. 1; 20 L.Ed.2d 889.

As this Court elaborated in Terry: "We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches . . . But we deal here with an entire rubric of police conduct . . . which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures."

(Emphasis added) Id. at 20.

In the case before this Court, Respondent's backyard was observed from the air during a brief pass at 1000 feet to confirm an anonymous tip that

marijuana was being grown there.

(161 Cal. App. 3d at 1085) The pivotal question, assuming it was a "search", is whether or not that intrusion was reasonable within the meaning of the Fourth Amendment. Examined in light of the principles set forth in Terry amicus submits that it was.

IV

WHEN A MAGISTRATE ISSUES A SEARCH WARRANT BASED ON CONDUCT BOTH THE MAGISTRATE AND THE AFFIANT REASONABLY DEEM TO BE LAWFUL, THE EXCLUSIONARY RULE DOES NOT BAR USE OF THE EVIDENCE SEIZED WHEN AN APPELLATE COURT, IN A CASE OF APPARENT FIRST IMPRESSION, LATER DEEMS THAT CONDUCT UNLAWFUL

In this case, Officer Shutz obtained a search warrant from a magistrate to search Respondent's yard. If the overflight preceding the warrant was legal, no issue of probable cause exists. The issue is whether or not the exclusionary rule should apply where a magistrate,

by signing the warrant, implicitly determines that the facts supporting probable cause have themselves been lawfully obtained, but an appellate court subsequently states a new proposition of law and concludes they were not lawfully obtained. Amicus submits that exclusion of evidence in such a case would not "efficaciously" serve the "remedial objectives" of the exclusionary rule.

United States v. Leon (1984) 468 U.S. ___, 82 L.Ed. 2d at 689.

In Leon, this Court was faced with a situation where an officer gathered facts, the magistrate issued the warrant, and a subsequent court decision determined those facts to be inadequate to show probable cause. However, since the officer reasonably believed he had enough facts and the magistrate confirmed that belief by

issuing the warrant, this Court declined to apply the extreme sanction of exclusion.

In the present case, the officer has gathered the facts, the magistrate has issued the warrant and a subsequent decision of apparently first impression has determined that the process by which he gathered those facts violated the search clause of the Fourth Amendment. The lower court apparently found this distinction to differentiate the present case from Leon. We submit the distinction is without a difference.

The fact remains that the officer reasonably believed his overflight was proper, and so did the magistrate. A number of cases had held prior to September 2, 1982 (the date of the overflight) that a defendant reposed no

reasonable expectation of privacy in his criminal enterprise from intentional or inadvertent aerial observation. See e.g., State v. Davis (Ore. App. 1981) 627 P.2d 492, pet. den. 634 P.2d 1346; Tuttle v. Superior Court (1981) 120 Cal. App. 3d 320; People v. Joubert, supra, 118 Cal. App. 3d 637; United States v. DeBacker (WD Mich. 1980) 493 F. Supp. 1078; State v. Stachler (Haw. 1977) 570 P.2d 1323; People v. Superior Court (Stroud), supra, 37 Cal. App. 3d 836.

Two years later, the Court of Appeal has determined, on Fourth Amendment grounds, that what was considered to be a non-search was a warrantless search. We submit that exclusion of the evidence was not warranted. See Leon, supra at 695-699 and fn. 23.

CONCLUSION

For the foregoing reasons,
amicus submits that the petition should
be granted and the decision of the Court
of Appeal reversed.

Respectfully submitted on behalf of
the Appellate Committee of the
California District Attorney's
Association

John H. Darlington
JOHN H. DARLINGTON
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Nevada County

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Attorneys for the California District
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DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.

I, the undersigned, hereby
declare under penalty of perjury,
that the following is true and
correct:

I am a citizen of the
United States, over eighteen years of
age, not a party to the within cause
and employed in the Office of the
District Attorney of Los Angeles
County, under the supervision of
Harry B. Sondheim, Head, Appellate
Division, a member of the bar of this
court at whose direction the service
was made, with principal offices
located at 849 South Broadway,

Los Angeles, California 90014-3296; that the District Attorney is the amicus Curiae on behalf of the Petitioner in the above-entitled matter. On May 8, 1985, I served seven copies of the foregoing on the following persons and Courts by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail in the City of Los Angeles in compliance with Supreme Court Rule 28, paragraph three, addressed as follows:

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Executed on May 8, 1985
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MYRA BAYMAN

DECLARATION OF SERVICE ON THE COURT
STATE OF CALIFORNIA } ss.
COUNTY OF LOS ANGELES }

The undersigned, Harry B. Sondheim, Head, Appellate Division, is a member of the bar of this Court. On May 8, 1985, under my supervision, Alan Yockelson, an employee of the Office of the District Attorney of Los Angeles County, placed in the United States mail, with first class postage prepaid and via U.S. Postal Service Express mail, with postage prepaid, a box containing forty copies of the instant brief addressed as follows:

Office of the Clerk
United States Supreme Court
Washington DC 20543

HARRY B. SONDEHEIM